IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 28, 2006 Session

CHRISTOPHER ANDERSON v. A & F ELECTRICAL COMPANY, INC.

Appeal from the Chancery Court for Davidson County
No. 02-1901-I Claudia Bonnyman, Chancellor

No. M2005-00610-COA-R3-CV - Filed July 28, 2006

Appellant, A & F Electric, Inc., appeals from a judgment entered against it on a claim of retaliatory discharge raising essentially three issues: (1) whether the jury verdict was excessive; (2) whether the court and jury erred in finding that the Plaintiff's cause of action was filed within the one-year statute of limitations period; and, (3) whether the trial court erred in allowing the Plaintiff to play before the jury portions of a witness's earlier testimony for the purposes of impeachment. The Plaintiff raises as error the trial court's granting a directed verdict with regard to a claim for punitive damages. We find no error concerning the issues raised by the Appellant but reverse the trial court's ruling as to punitive damages and remand the case for further proceedings on that issue.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in part, Reversed in part and Remanded

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which ALAN E. HIGHERS and DAVID R. FARMER, JJ, joined.

W. H. (Steve) Stephenson, II, Nashville, Tennessee, for Appellant, A & F Electric Company, Inc.

David Cooper, Nashville, Tennessee, for Appellee, Christopher Anderson.

OPINION

FACTUAL BACKGROUND

Plaintiff, Christopher Anderson (Anderson), is an electrician who began working for A & F Electric Company, Inc. (A & F), in November 1996. In addition to his electrical work, Anderson developed an interest in automobile racing. He drove a race car at the Highland Rim Speedway for

three years beginning in 1995 and raced a truck in Nashville on a part time basis beginning in 1998.

Anderson was hired by A & F as an electrician. In 1998, he was promoted to lead man with other electricians working under him. A & F provided him with a work truck, tools and equipment, a cell phone and a credit card for gas and other supplies. Anderson received three raises while working at A & F, and at the time he last worked for that company was making $14.75 per hour plus medical insurance, paid holidays and a paid vacation..

Anderson's work assignments normally came through his supervisor, Danny Spicer. In the fall of 2000, one of the owners of A & F, Terry Atwood (Atwood), came to Anderson and asked if he would be interested in working on a new racing facility being constructed by the race car driver, Bobby Hamilton. The job involved installing the electrical service and lighting in the facility and was estimated to take about three months. Anderson accepted the assignment. Atwood explained to Anderson that Hamilton would be paying him directly at his same hourly rate. Normally, A & F would have charged a customer $40 to $50 per hour for one of their employee's services. By letting Hamilton pay Anderson directly, the cost to Hamilton would be reduced to $14.75 per hour. Atwood made this concession for Hamilton because their sons raced together and the two men were good friends. Atwood obtained the permit for the job and showed Anderson what needed to be done.

According to Atwood, when Anderson went to work at Bobby Hamilton's, it was thought he was leaving to work in the racing business and would not be returning to A & F. According to Anderson, Atwood, at no time, told Anderson that he would not remain an employee at A & F. A & F maintained Anderson's medical insurance coverage during the time he worked on the Hamilton project. Anderson also kept the truck, tools, cell phone and credit card provided by A & F. He obtained materials needed for the job from the A & F shop. During the early weeks of the Hamilton job, Anderson continued to work on other A & F projects. At times, other A & F employees worked under him at the Hamilton facility.

On January 16, 2001, while working in the Hamilton facility, Anderson injured his right knee. He was taken to the emergency room at Skyline Medical Center. Prior to entering the emergency room, he phoned Atwood, explained what had happened and inquired as to whether he needed to report the incident to the workers' compensation carrier. According to Anderson, Atwood responded that he could not turn it in as a workers' compensation claim because his insurance premiums were already too high. Atwood suggested he report the incident to Bobby Hamilton. Anderson made an attempt to do that but was told he did not work for Hamilton. When this information was relayed to Atwood, he suggested Anderson use his regular medical insurance.

After an examination in the emergency room, Anderson was referred to an orthopaedic surgeon, Dr. Robert Fogolin. Anderson had sustained a torn meniscus and a torn medial collateral ligament. On March 14, 2001, Dr. Fogolin performed surgery on the knee and Anderson remained under Dr. Fogolin's care until June 16, 2001. Anderson's medical treatment was paid for through his regular medical insurance coverage.

Shortly after his surgery, Anderson again approached Atwood about reporting the injury as a workers' compensation claim. At the time, Anderson had no income and, while his treatment was being covered by his medical insurance, it only paid 80 percent of the expenses and Anderson was being billed for the remainder. Atwood responded that he was paying $2,200 per week in workers' compensation payments already and could not afford to pay more. Filing an additional claim would increase A & F's workers' compensation insurance premium. According to Anderson, Atwood did not claim that Anderson was not an employee of A & F during this conversation. Atwood testified he told Anderson that he was an employee of Bobby Hamilton at the time he was injured.

Anderson had no income after March 2001. His wife was forced to take a part time job to help with the expenses. A lawsuit was filed by Anderson seeking workers' compensation benefits. An answer to the lawsuit was mailed to Anderson's attorney on June 1, 2001. In the answer, A & F took the position that Anderson was an employee of Bobby Hamilton at the time of his injury. Thereafter, on July 2, 2001, Anderson reported to the A & F shop to return to work. He was informed by Danny Spicer that A & F could not put him back to work until they spoke with their attorney and found out what was going on with Anderson's workers' compensation lawsuit. Atwood confirmed Anderson had reported for work and, in Atwood's words, stated, "we couldn't let him go to work with a lawsuit against us."

According to Anderson and his wife, on Friday, July 6, 2001, Danny Spicer came to the Andersons' residence and retrieved the A & F truck, tools, cell phone and credit card. When Anderson inquired what that meant, Spicer replied, "It basically means you're fired. You don't work here no more." Anderson testified that was the first time he had been informed that he was terminated. Anderson went to the A & F shop and obtained a separation notice.[1] Mr. Anderson did not return to work at A & F Electric following that incident.

As a result of being terminated, Anderson was able to file for unemployment benefits. His application was initially approved around the first of August 2001. Anderson later received a letter from the State of Tennessee Board of Labor and Workforce Development stating their initial determination had been appealed and there would be a hearing to determine who was responsible for the unemployment insurance premiums. That hearing was held November 28, 2001, following which the Board found that Anderson was an employee of A & F Electric at the time of his termination.

On June 27, 2002, Anderson filed suit against A & F alleging a retaliatory discharge as a result of his filing a complaint for workers' compensation benefits. The case was tried before a jury on June 28-30, 2004. The jury returned a verdict in favor of the plaintiff on the issue of retaliatory discharge and awarded compensatory damages in the amount of $138,955. After subsequent proceedings, Anderson was also awarded $56,780.00 in back pay, $3,516.96 in loss of health

[1]The notice was dated July 6, 2001, and indicated that Anderson had quit to go to work for one of A & F Electric's customers, Bobby Hamilton. From an examination of that document, it appears someone had originally marked that he had been discharged. That entry was whited out and the box for "quit" was marked.

insurance premiums and prejudgment interest on the back pay and lost insurance premiums in the amount of $3,014.85.

On December 2, 2004, the trial court entered an Amended Order of Judgment awarding Anderson the relief stated above. On December 20, 2004, A & F filed its motion for a new trial. Anderson also filed a motion for new trial on December 29, 2004, reciting that at conclusion of the proof and prior to the closing argument the trial court ruled that the evidence presented did not rise to the level of either intentional or malicious conduct by A & F and, consequently, the plaintiff's claim for punitive damages was removed from consideration by the jury. The record before us does not contain either the jury charge or the transcript of the proceedings wherein the Court dismissed the claim for punitive damages. The trial court overruled both motions for new trial and this appeal was taken.

On this appeal, A & F essentially raises three issues. The first set of issues relate to the appropriateness of the jury's verdict. A second issue raised is whether the court and jury erred in finding the lawsuit was filed within the one-year limitations period established in Tennessee Code Annotated section 28-3-104(a)(1). The third issue is whether the trial court erred in allowing the Plaintiff to play before the jury portions of a witness's earlier testimony for the purposes of impeachment. The Plaintiff raises as error the trial court's granting a directed verdict with regard to a claim for punitive damages.

APPROPRIATENESS OF THE VERDICT

Several issues raised by the Appellant may be reduced to a consideration of whether the verdict of the jury was excessive. We begin our examination of this issue by determining the appropriate standard of review. Rule 13(d), Tenn. R. App. P., provides:

> Findings of Fact in Civil Actions. Unless otherwise required by statute, review of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. Findings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict.

The jury found, as a fact, Mr. Anderson had been damaged in the amount of $138,955.00. The trial court, as thirteenth juror, approved the verdict in that amount. The trial judge has the duty and authority to independently weigh the evidence and change the verdict if he or she disagrees with it. *Ridings v. Norfolk Southern Railway Co.*, 894 S.W.2d 281, 288-89 (Tenn. Ct. App. 1994). This court does not have that authority in accordance with the cited rule. Thus, if there is material evidence to support the verdict in the amount approved by the trial court, we must affirm. *Ellis v. White Freightliner Corp.*, 603 S.W.2d 125, 129 (Tenn. 1980).

A claimant in a retaliatory discharge case may recover for the emotional distress caused by his firing. *Davis v. Reliance Elec. Indus. Co.*, 104 S.W.3d 57, 63 (Tenn. Ct. App. 2002). The

evidence related to emotional stress, humiliation and embarrassment was offered through the testimony of Appellant and his wife.

After being terminated by A & F Electric in July 2001, Anderson began looking for other employment. He filed several applications with different companies as well as going through a job placement service operated by the Tennessee Department of Workforce Development. None of the electrical contractors he applied with called him in for an interview. Because his wife only brought in about $100 per week at her part-time job, it was necessary that they apply for food stamps, TennCare and the assistance of the Metro Action Commission in paying their electric bill. According to Anderson, it was embarrassing to be forced to apply for public assistance but he was grateful that it was available. He testified," Embarrassing, humiliating or not, that is what I had to do to provide for my family."

The Anderson's health insurance provided by A & F was terminated at the end of July 2001. They carried COBRA insurance for two months thereafter but, due to the expense of it and the lack of income, were forced to drop the coverage. From September 2001 to February 2002 the family had no medical insurance. They applied for TennCare coverage and received it in February 2002. In 2003, when Anderson returned to work, they lost TennCare and Anderson's new employment did not provide medical insurance. For approximately one year, beginning in 2003, they were not covered. They were not able to take their child, Hannah, for her annual check-up. According to Anderson, having a small child with no medical insurance was stressful.

Prior to being fired and the injury, Anderson and his wife spent most of their weekends at the racetrack. Following the loss of his job they could no longer afford to do that. Anderson had to sell his race car and the tools and equipment he had to work on racing vehicles in order to provide income for his family. The Andersons borrowed money from his parents in the amount of $15,000 and roughly $7,000 to $7,500 from his wife's parents in order to get by. The family rented their residence from his mother. She reduced the rent from $700 per month to $300 per month so they could afford it.

Losing his job caused the Andersons to have marital problems. They constantly fought about money, how they were going to pay the bills and not having insurance. They wanted to continue growing their family by having another child, but they had to put that off. His wife was a senior in college when she had to quit to have their first child. They wanted her to return and complete her college education but were not financially able to do so. At one point she left home for about three or four weeks due to the stress between them.

There is material evidence to support the jury's determination as to damages. This court has frequently said that damages for stress, humiliation and embarrassment is peculiarly within the province of the jury subject to the rule of reasonableness. *Forbes v. Wilson County*, 1998 Tenn. App. LEXIS 340, No. 01A01-9602-CH-00089 (Tenn. Ct. App. May 20, 1998); *McDowell v. Shoffner Indus. of Tenn., Inc.*, 1993 Tenn. Ct. App. LEXIS 472, No. 03 A01-9301-CH-00030, 1993 WL

262846 (Tenn. App. July 13, 1993). We do not find the jury's award, as approved by the trial judge, unreasonably excessive.

The Appellant also argues the jury may have considered Anderson's lost wages and benefits as well as damages to other family members in arriving at its verdict. We assume the jury was correctly instructed as to the elements of damages they could award. The trial judge conducted a separate hearing to determine whether, under the instructions given, the jury may have included lost wages and benefits in its verdict. After this hearing the trial court approved the verdict of the jury and also awarded an additional amount for lost wages or back pay and lost benefits. The Appellant has failed to point to anything in the record before us that would indicate the trial court's determination was erroneous.

STATUTE OF LIMITATIONS

The next issue presented for our review is whether the jury and trial court erred in determining Anderson's claim for retaliatory discharge was not barred by the statute of limitations. The record indicates this issue was presented to the jury. While the jury instructions were not made a part of the record on this appeal, we presume the jury was correctly charged with regard to this issue.

In order to establish a cause of action for discharge in retaliation for asserting a workers' compensation claim, a plaintiff must plead and prove the following elements:

(1) The plaintiff was an employee of the defendant at the time of the injury;

(2) the plaintiff made a claim against the defendant for workers' compensation benefits;

(3) the defendant terminated the plaintiff's employment; and

(4) the claim for workers' compensation benefits was a substantial factor in the [defendant's] motivation to terminate the plaintiff's employment.

Anderson v. Standard Register Co., 857 S.W.2d 555, 558 (Tenn. 1993).

An action based on a retaliatory discharge is deemed to be an action for injury to the person and, as such, is subject to the one-year statute of limitations provided for in Tennessee Code Annotated section 28-3-104(a)(1) (Supp. 1990). *Headrick v. Union Carbide Corp.*, 825 S.W.2d 424, 425-26 (Tenn. App. 1991) The limitations period commences when the employee receives unequivocal notice that the employer has made a definite and final decision to terminate the employee. *Weber v. Moses*, 938 S.W.2d 387, 392-93(Tenn. 1996). Because the statute of limitations is an affirmative defense, the employer, in this case A & F, has the burden of proving that the statute had run by the time Anderson filed this lawsuit on June 27, 2002. *Carr v. Borchers*, 815 S.W.2d

528, 532 (Tenn. App. 1991); *Jones v. Hamilton County*, 56 Tenn. App. 240, 405 S.W.2d 775, 779 (Tenn. App. 1965).

At trial, A & F took the position that its answer filed in the workers' compensation case alleging Anderson was an employee of Bobby Hamilton at the time of his injury served as notice to him that he was no longer an employee of A & F. The answer was forwarded to Anderson's workers' compensation attorney on June 1, 2001. There was no evidence Anderson ever received a copy of the answer. Anderson took the position that he first learned of his termination on July 6, 2001, when Danny Spicer came to his home to pick up the A & F truck, the tools and equipment, the cell phone he had been issued and the A & F credit card. He was also provided a notice of termination on that date. The jury, by ruling in favor of Anderson, must have found he first received notice of termination less than one year before June 27, 2002. "Findings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict." Tenn. R. App. P. 13(d). Since, in our view, there was material evidence to support the jury's finding we are not at liberty to alter the result. There is no merit to this issue.

IMPEACHMENT EVIDENCE

The final issue raised by the Appellant concerns the testimony of Daniel Charles Spicer, the field superintendent for A & F when Anderson last worked there. Spicer indicated on direct examination that he had taken the truck driven by Anderson toward the end of March 2001. The date Anderson's truck and equipment were taken from him were significant to the statute of limitations issue submitted to the jury. Spicer also testified at the unemployment benefit hearing on November 28, 2001. On cross-examination, he testified he did not recall testifying at that hearing that he picked the truck up in July 2001. There were several other factual issues about which Spicer could not recall testifying differently at the unemployment hearing.

Counsel for Anderson requested the court's permission to play a tape recording of Spicer's testimony at that hearing. Counsel for A & F objected to admission of the tape on the basis it had not been listed on the exhibit list provided by plaintiff's counsel pursuant to local rule.[2] The trial

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[2]Davidson County Local Rules of Practice § 29.01 provides:

Required Exchange of Witnesses and Documents

At least seventy-two (72) hours (excluding weekends and holidays) before the trial of a case, opposing counsel shall either meet face-to-face or shall hold a telephone conference for the following purposes:

a. to exchange names of witnesses, including addresses and home and business telephone numbers (if not included in interrogatory answers), including anticipated impeachment or rebuttal witnesses; and

b. to make available for viewing and to discuss proposed exhibits.

In the event that the parties hold a telephone conference rather than a face-to-face meeting, the exhibits shall be made (continued...)

court appropriately gave counsel for A & F time to listen to the tape prior to its being played during the trial. The judge determined the local rule referred to exhibits an attorney planned to use in their case in chief and not to items an attorney might use for impeachment. The tape of Mr. Spicer's testimony at the hearing was played for the jury. Spicer authenticated the tape as a recording of his testimony at the November 28, 2001, hearing. At that hearing, Spicer acknowledged as correct a statement that on July 6 when he came to pick up the truck he told Anderson he could not put him back to work until Terry (Atwood) talked to an attorney. He also admitted testifying differently with regard to the other factual issues about which he had been asked.

The admissibility of evidence is within the sound discretion of the trial court and will be reversed only when there is an abuse of discretion. *Rothstein v. Orange Grove Center, Inc.*, 60 S.W.3d 807, 811 (Tenn. 2001). Rule 613(b) of the Tennessee Rules of Evidence allows extrinsic evidence of a prior inconsistent statement by a witness once the witness has been afforded an opportunity to explain or deny the prior statement. With regard to each prior inconsistent statement, Spicer was asked if he recalled testifying in that fashion during the unemployment benefits hearing. In each case, he testified he did not recall. After listening to the tape he confirmed he had, in fact, testified at the prior hearing inconsistently with his trial testimony. An appellant court should not reverse an evidentiary ruling "unless the trial court applied an incorrect legal standard, based its decision on a clearly erroneous view of the evidence, or has reached a decision against logic and reason that caused injustice to the complaining party." *Richardson v. Miller*, 44 S.W.3d 1, 21 (Tenn. Ct. App. 2000). In the case before us an injustice would have occurred had the court excluded evidence of Spicer's prior testimony. The rule of evidence relating to prior inconsistent statements was precisely followed by the trial court. Since we agree with the trial court's ruling, we find no abuse of discretion and this issue is without merit.

PUNITIVE DAMAGES

The Appellee alleges the trial court erred when it granted a directed verdict and dismissed the Appellee's claim for punitive damages. While this ruling of the trial court was not contained in the transcript filed in this case, there is evidence in the record before us that the trial court dismissed the punitive damages claim because the evidence did not rise to the level of intentional or malicious conduct as required by *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 900-01 (Tenn. 1992).

Punitive damages are intended to punish a defendant for wrongful conduct and to deter others from similar conduct in the future. *Liberty Mutual Insurance Company v. Stevenson*, 212 Tenn. 178, 368 S.W.2d 760 (1963). Recognizing the threat of punitive damages to be an effective means of deterring employers from frustrating the purpose of our workers' compensation laws, the Tennessee Supreme Court has stated, "[w]e therefore hold that in future cases a successful plaintiff in a suit for retaliatory discharge will be permitted to recover punitive damages. . . " *Clanton v. Cain-Sloan*, 677 S.W.2d 441, 445 (Tenn. 1984). After the *Clanton* decision, the Tennessee Supreme Court, in

[2](...continued)
available for viewing before the conference.

Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 900-01 (Tenn. 1992), held that in order to recover punitive damages, a plaintiff must prove, by clear and convincing evidence, that the defendant acted (1) intentionally, (2) fraudulently, (3) maliciously, or (4) recklessly. The limitations contained in *Hodges* did not change the Court's stand on the availability of punitive damages in a retaliatory discharge case. Apparently on the theory retaliatory discharge is an intentional tort, the Court later stated, "we have specifically held that punitive damages may be assessed in retaliatory discharge cases to insure that employers comply with the duties imposed upon them by the Tennessee Worker's Compensation Act. *Coffey v. Fayette Tubular Prods.* 929 S.W.2d 326, 328 (Tenn. 1996).

In the case now before us, A & F may have had an arguable defense to Anderson's workers' compensation claim. That fact did not justify their terminating him when he filed a complaint in court seeking workers' compensation benefits. When describing why the company did not allow Anderson to return to work on July 2, 2001, one of the owners of A & F, Terry Atwood testified, "we couldn't let him go to work with a lawsuit against us." A reasonable jury may have found this statement as well as other circumstances in the case to amount to clear and convincing evidence that A & F acted intentionally in discharging Anderson because he sought to enforce his rights under the Tennessee Workers' Compensation Act. In view of the policy stated by the Tennessee Supreme Court and the facts of this case, the issue of punitive damages should have been submitted to the jury. We reverse the ruling of the trial court and remand the case for a new trial limited to the issue of punitive damages. See, *Rothstein v. Orange Grove Center, Inc.*, 60 S.W.3d 807, 814-15 (Tenn. 2001).

The judgment of the trial court is affirmed in part and reversed in part and this matter is remanded to the trial court for a new trial on the issue of punitive damages. The costs of this appeal are assessed against Appellant, A & F Electric Company, Inc.

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DONALD P. HARRIS, SENIOR JUDGE